No. 2486

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HENRY F. MARSHALL,

Appellant,

vs.

SAMUEL W. BACKUS, as Commissioner of Immigration for the Port of San Francisco,

Appellee.

In the Matter of the Application of Henry F. Marshall for Writs of Habeas Corpus on Behalf of Thirty-five Hindus.

APPELLANT'S PETITION FOR A REHEARING.

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Filed this.....day of March, 1916.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The appellant above named respectfully prays for a rehearing of the above entitled cause, after decision on appeal by this Honorable Court, and for grounds of such rehearing represents as follows, to wit:

Upon the appeal, this Court affirmed the judgment of the District Court "upon the authority of *Healy v. Backus,* 221 Fed. 358, and *Choy Gum v. Backus,* 223 Fed. 487".

The *Choy Gum* case relates entirely to the fairness of the hearings and, for the purposes of this petition, may be disregarded.

The *Healy* case, however, dealt with the question as to whether there was "any pertinent or competent testimony adduced by which to support the findings of the Department".

Upon this important question the affirmative decision of this Court rested chiefly, if not exclusively, upon the case of *United States v. Uhl,* 215 Fed. 573, a long excerpt from that decision being incorporated in this Court's opinion.

But that case, so cited with approval, has since been reversed by the Supreme Court of the United States, which has expressly condemned the reasoning and conclusions incorporated in the *Healy* opinion. It follows that, as to this point, *Healy v. Backus* has been overruled, and is no longer authority.

The Supreme Court decision referred to was rendered on October 25, 1915, under the title *Gegiow v. Uhl;* it has not yet been reported, so far as we have been able to discover, and for that reason is printed herein in full, as "Addenda".

I.

AN ALIEN LABORER CANNOT BE DECLARED LIKELY TO BECOME A PUBLIC CHARGE BY REASON OF LOCAL CONDITIONS OF THE LABOR MARKET OR LOCAL RACE PREJUDICE IN THE CITY OR STATE OF HIS IMMEDIATE DESTINATION.

In the present case, the warrants of arrest were asked for the reason that there was no local demand for, but some local prejudice against, laborers of this class, the exact wording being (Trans. pp. 28-29):

> "That these aliens are laborers; that there is no demand *in this section* for that class of labor; further that there is a decided prejudice among the people *of this locality* against this class of labor." (Italics ours.)

Upon these representations and for these reasons the warrants of arrest issued, the specific charges being (Trans. p. 30):

> "That the said aliens are members of the excluded classes in that they were persons likely to become public charges at the time of their entry into the United States."

Obviously, local lack of demand for and prejudice against these laborers as a class is the onus of the charge.

In the petition it is alleged (Tr. p. 20) that a lot of miscellaneous matter, letters, affidavits, interviews and newspaper clippings, tending to show lack of demand for and prejudice against this class of labor, were placed in the record.

In the return (Tr. p. 63, par. 4) it is set forth that these papers were not actually in the official record, but were part of the record in another Hindu case then on appeal, and were included in the case at bar "only by reference, and were examined by the attorney for the aliens". These are the clippings, etc., of record in the *Healy* case, concerning which this Court said:

> "There was an amount of testimony adduced in the form of affidavits, interviews, letters, and newspaper clippings, showing the state of the public mind *in California* towards the Hindus as a race or class, the condition of the labor market in general, and especially as it related to Hindus, the desirability or non-desirability among employers for their employment, and the demand or lack of any considerable demand for labor of this kind." (Italics ours.)

Again it is obvious that these documents, showing local lack of demand for and prejudice against this class of labor, are relied upon as constituting general evidence supporting the charge of "likely to become a public charge".

But the Supreme Court, in *Gegiow v. Uhl, infra,* has declared that an alien cannot be held to be likely to become a public charge by reason of local labor conditions, and that "it would be an amazing claim of power" if the immigration authorities decided not to admit aliens because of labor conditions which might be general all over the United States.

There being no other or further evidence in the record to sustain the findings of the Department,

the rehearing should be granted and the case reversed.

In all fairness it should be stated that some of these aliens were discovered to have hook-worm, there being, however, nothing to show whether it was acquired before or after landing in United States territory. In view of the fact that *all the aliens were ordered deported as likely to become public charges* and those having hook-worm on the additional ground of disease, the latter may be considered merely as make-weight. At any rate this consideration does not affect those free from the disease, nor does it present any difficulty here, since, upon reversal, the matter may be remanded for further proceedings in the District Court as to the hook-worm cases.

II.

THE COURT ERRED IN TACITLY REFUSING TO HOLD THAT ADMISSION OF AN ALIEN TO THE PHILIPPINE ISLANDS IS ADMISSION TO THE UNITED STATES.

In *Gegiow v. Uhl,* the Supreme Court held that "The statute deals with admission to the United States, not to" some part thereof.

Section 33 of the Immigration Act expressly provides that "for the purposes of the Act" the term "United States shall be construed" to include the Philippine Islands.

If the Supreme Court is right and admission is to the United States and not to some part thereof,

then admission at the Port of Manila is "to the United States" as a whole and not to the Philippine Islands alone. And the question of protecting continental labor conditions from persons coming from the islands is entrusted, not to the immigration authorities at their discretion, but to the President. (*Gegiow v. Uhl, infra.*)

We respectfully submit that the petition for a rehearing should be granted, that the aliens not suffering from disease should be ordered released, and that as to the hook-worm cases the matter should be remanded for appropriate action.

Dated, San Francisco,
March 3, 1916.

Respectfully submitted,

HENRY F. MARSHALL,
ALBERT MICHELSON,
Attorneys for Appellant and Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

HENRY F. MARSHALL,
Of Counsel for Appellant and Petitioner.

ADDENDA.

In the Supreme Court of the United States

No. 340
October Term, 1915

Ali Gegiow and Sabas Zarikoew, Petitioners, vs. Byron H. Uhl, as Acting Commissioner of Immigration at the Port of New York.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

(October 25, 1915)

Mr. Justice Holmes delivered the opinion of the Court.

The petitioners are Russians seeking to enter the United States. They have been detained for deportation by the Acting Commissioner of Immigration and have sued out a writ of *habeas corpus*. The writ was dismissed by the District Court and the Circuit Court of Appeals. (211 Fed. Rep. 236; 215 Fed. Rep. 573; 131 C. C. A. 641) By the return it appears that they are a part of a group of illiterate laborers, only one of whom, it seems, Gegiow, speaks even the ordinary Russian tongue, and in view of that fact it was suggested in a letter

from the Acting Commissioner to the Commissioner General that their ignorance tended to make them form a clique to the detriment of the community; but that is a trouble incident to the immigration of foreigners generally which it is for legislators not for commissioners to consider, and may be laid on one side. The objection relied upon in the return is that the petitioners were "likely to become public charges for the following, among other reasons: That they arrived here with very little money ($40 and $25, respectively) and are bound for Portland, Oregon, where the reports of industrial conditions show that it would be impossible for these aliens to obtain employment; that they have no one legally obligated here to assist them; and upon all the facts, the said aliens were upon the said grounds duly excluded" etc. We assume the report to be candid, and, if so, it shows that the only ground for the order was the state of the labor market at Portland at that time; the amount of money possessed and ignorance of our language being thrown in only as makeweights. It is true that the return says for that "among other reasons". But the state of the labor market is the only one disclosed in the evidence or the facts that were noticed at the hearing, and the only one that was before the Secretary of Labor on appeal; and as the order was general for a group of twenty it cannot fairly be interpreted to stand upon reasons undisclosed. Therefore it is unnecessary to consider whether to have the reasons disclosed is one of the alien's rights. The only matter we have to deal

with is the construction of the statute with reference to the present case.

The courts are not forbidden by the statute to consider whether the reasons, when they are given, agree with the requirements of the act. The statute by enumerating the conditions upon which the allowance to land may be denied, prohibits the denial in other cases. And when the record shows that a commissioner of immigration is exceeding his power, the alien may demand his release upon *habeas corpus*. The conclusiveness of the decisions of immigration officers under Section 25 is conclusiveness upon matters of fact. This was implied in *Nishimura Ekiu v. United States,* 142 U. S. 651, relied on by the government. As was said in *Gonzales v. Williams,* 192 U. S. 1, 15, "as Gonzales did not come within the act of 1891, the commissioner had no jurisdiction to detain and deport her by deciding the mere question of law to the contrary". Such a case stands no better than a decision without a fair hearing, which has been held to be bad. *Chin Yow v. United States,* 208 U. S. 8. See further *Zakonaite v. Wolf,* 226 U. S. 272; *Lewis v. Frick,* 233 U. S. 291, 297.

The single question on this record is whether an alien can be declared likely to become a public charge on the ground that the labor market in the city of his immediate destination is overstocked. In the act of February 20, 1907, c. 1134, Sec. 2; 34 Stat. 898; as amended by the act of March 26, 1910, c. 128, Sec. 1; 36 Stat. 263, determining who shall

be excluded, "Persons likely to become a public charge" are mentioned between paupers and professional beggars, and along with idiots, persons dangerously diseased, persons certified by the examining surgeon to have a mental or physical defect of a nature to affect their ability to earn a living, convicted felons, prostitutes and so forth. The persons enumerated in short are to be excluded on the ground of permanent personal objections accompanying them irrespective of local conditions unless the phrase before us is directed to different considerations than any other of those with which it is associated. Presumably it is to be read as generically similar to the others mentioned before and after.

The statute deals with admission to the United States, not to Portland, and in Sec. 40 contemplates a distribution of immigrants after they arrive. It would be an amazing claim of power if commissioners decided not to admit aliens because the labor market of the United States was overstocked. Yet, as officers of the general government, they would seem to be more concerned with that than with the conditions of any particular city or state. Detriment to labor conditions is allowed to be considered in Sec. 1, but it is confined to those in the continental territory of the United States and the matter is to be determined by the President. We cannot suppose that so much greater a power was entrusted by implication in the same act to every commissioner of immigration, even though subject to

appeal, or that the result was intended to be effected in the guise of a decision that the aliens were likely to become a public charge.

Order reversed.